



This document is scheduled to be published in the Federal Register on 09/16/2014 and available online at <http://federalregister.gov/a/2014-22069>, and on FDsys.gov

Billing Code 4210-67
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5 and 232

[Docket No. FR--5794-I-01]
RIN 2502-AJ25

Federal Housing Administration (FHA): Section 232 Healthcare Facility Insurance Program – Aligning Operator Financial Reports with HUD’s Uniform Financial Reporting Standards

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Interim rule.

SUMMARY: Through a final rule published on September 7, 2012, HUD revised the regulations for FHA’s program for insurance of health care facilities under section 232 of the National Housing Act (Section 232 program). In the September 7, 2012, final rule, HUD retained the longstanding requirement that owners and borrowers participating in the Section 232 program submit audited financial statements to HUD, and added the requirement that operators of Section 232 facilities also submit financial statements to HUD on a quarterly and annual basis. However, the September 7, 2012, rule placed operators on a different submission deadline than that required of owners. This interim rule revises the financial reporting deadlines for operators to bring them in-line with the reporting periods prescribed in HUD’s Uniform Financial Reporting Standards, to which owners and borrowers are subject.

DATES: *Effective date:* [Insert date that is 30 days after the date of publication in the Federal Register.]

Comment due date: [Insert date that is 60 days after date of publication in the Federal Register].

ADDRESSES: Interested persons are invited to submit comments on this interim rule to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-0500.

Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at www.regulations.gov. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the www.regulations.gov website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD

Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-402-3055 (this is not a toll-free number).

Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service, toll-free, at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: Vance T. Morris, Office of Residential Care Facilities, Office of Healthcare Programs, Office of Housing, Department of Housing and Urban Development, 451 7th Street, SW, Room 6264, Washington, DC 20410-8000; telephone number 202-708-0599 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

I. SUPPLEMENTARY INFORMATION:

A. Background

Section 232 of the National Housing Act (12 U.S.C. 1715w) (Section 232) authorizes FHA to insure mortgages made by private lenders to finance the development of nursing homes, intermediate care facilities, board and care homes, and assisted living facilities (collectively, residential healthcare facilities). The Section 232 program allows for long-term, fixed-rate financing for new and rehabilitated properties for up to 40 years. Existing properties without rehabilitation can be financed with or without Ginnie Mae®¹ Mortgage Backed Securities for up to 35 years. Eligible borrowers under the Section 232 program include investors, builders, developers, public entities, and private nonprofit corporations and associations. The documents

¹ Ginnie Mae is a registered service mark of the Government National Mortgage Association; see <http://www.ginniemae.gov/>.

executed at loan closing provide that the borrower may not engage in any other business or activity.

As the need for residential care facilities increased, requests to FHA to make mortgage insurance available for such facilities also increased. Updates to the Section 232 program regulations, codified at 24 CFR part 232, were needed to ensure that program requirements are sufficient to meet increased demand, and prevent mortgage defaults that not only impose a risk to the FHA insurance fund but can jeopardize the safety and stability of Section 232 facilities and their residents.

B. September 7, 2012 Regulatory Revisions

In 2012, HUD commenced the rulemaking process to make the updates needed to the Section 232 program regulations, regulations that had not been revised since 1996. By final rule published on September 7, 2012, at 77 FR 55120, HUD revised the Section 232 program regulations to reflect current policy and practices, and improve accountability and strengthen risk management in the Section 232 program. The September 7, 2012, final rule was preceded by a proposed rule published on May 3, 2012, at 77 FR 26304.

Included in the updates made by the 2012 rulemaking were revisions to 24 CFR 5.801 (Uniform Financial Reporting Standards) and 24 CFR 232.1009 (Financial Reports), both of which contained reporting requirements applicable to the Section 232 program. HUD revised these regulatory sections to include operators of projects insured or held by HUD as entities that must submit financial statements to HUD. Owners and borrowers have long been required to submit financial reports

Sections 5.801(c)(4) and 232.1009 provide that operators must submit financial statements to HUD quarterly within 30 calendar days of the date of the end of each fiscal quarter,

and 60 calendar days from the end of the fiscal-year-end quarter to submit final fiscal year end quarter and fiscal year-to-date reports to HUD. The other entities required to submit reports were provided slightly longer periods to prepare and submit the reports than that provided to operators. In the September 7, 2012, final rule, commenters asked that HUD extend the 30-day filing deadline for end-of-each quarterly report to 60 days. HUD declined to provide the extension and stated that receipt of unaudited quarterly and year-to-date operator financial statements promptly at the end of each quarter is needed for effective monitoring of a property's financial operations and the trend of those operations. HUD further stated that in recognition of the intricacies involved in developing year-end financial statements, HUD extended the submission of the final quarter and year-to-date operator certified statements submitted for the 4th fiscal quarter to 60 calendar days (originally proposed to be 30 calendar days) following the end of the fiscal year. (See 77 FR 55122 and 55132.)

C. This Interim Rule

This interim rule increases the amount of time operators have to comply with the reporting requirements provided in §§ 5.801(c)(4) and 232.1009. With almost two years of administering the Section 232 program under the revised regulations, HUD has determined that it can provide operators additional time to submit financial reports and maintain the effective monitoring of a property's financial operations and the trend of those operations, which was of concern to HUD in the September 7, 2012, rule.

This interim rule provides that operators will have an additional 30 calendar days to comply with the financial statement reporting requirements. Operators will now have 60 calendar days following the end of a fiscal quarter and 90 calendar days following the end of the fiscal-year-end quarter to comply with HUD's financial statement reporting requirements.

In addition to the changes to 24 CFR 5.801(c)(4) and 24 CFR 232.1009, HUD further revises § 232.1009, to include language that HUD included in § 5.801(c)(4), and that is that HUD may direct the submission of reports (referred to as forms in the regulatory text) to the lender or another third party in addition to or in lieu of submission to HUD.

II. Justification for Interim Rulemaking

HUD generally publishes rules for advance public comment in accordance with its rules on rulemaking at 24 CFR part 10. However, under 24 CFR 10.1, HUD may omit prior public notice and comment if it is “impracticable, unnecessary, or contrary to the public interest.” This interim rule relaxes a reporting requirement for operators by allowing operators more time to comply with HUD’s financial statement reporting requirements. Allowing operators the additional time to submit financial statements responds positively to prior public comment from operators received in response to the 2012 rulemaking. HUD believes it is not necessary to delay implementation of this change to first take public comment, given the prior public comment already submitted on this issue. As stated in the preamble, allowing operators additional time to submit their financial reporting requirements does not adversely affect the monitoring contemplated by HUD in the 2012 rulemaking.

Although HUD has determined that good cause exists to publish this rule for effect without prior solicitation of public comment, HUD recognizes the value and importance of public input in the rulemaking process. Accordingly, HUD is issuing these regulatory amendments on an interim basis and providing a 60-day public comment period. All comments will be considered in the development of the final rule.

III. Findings and Certifications

Executive Order 13563, Regulatory Review

The President's Executive Order (EO) 13563, entitled "Improving Regulation and Regulatory Review," was signed by the President on January 18, 2011, and published on January 21, 2011, at 76 FR 3821. This EO requires executive agencies to analyze regulations that are "outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." Section 4 of the EO, entitled "Flexible Approaches," provides, in relevant part, that where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. HUD submits that the changes made by this rule to the Section 232 regulations are consistent with the EO's directions as the rule reduces the burden on regulated parties by allowing for less restrictive reporting periods.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The changes required by this rule do not impose significant economic impacts on these small entities or otherwise adversely disproportionately burden such small entities. In fact, such small entities should benefit from the less restrictive reporting period. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Impact

This interim rule does not direct, provide for assistance or loan and mortgage insurance for, otherwise govern or regulate real property acquisition, disposition, leasing, rehabilitation, alteration, demolition, or new construction; or establish, revise, or provide for standards for construction or construction materials, manufactured housing, or occupancy. This interim rule is limited to changing submission deadlines for required reports. Accordingly, under 24 CFR 50.19(c)(1), this rule is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either: (1) imposes substantial direct compliance costs on State and local governments and is not required by statute, or (2) preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule will not have federalism implications and would not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C.1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Information Collection Requirements

The information collection requirements contained in this rule were reviewed by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), and assigned OMB Control Number 2502-0605. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance Number for the Mortgage Insurance Nursing Homes, Intermediate Care Facilities, Board and Care Homes and Assisted Living Facilities mortgage insurance programs is 14.129.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Grant programs-housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs-housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, Wages.

24 CFR Part 232

Fire prevention, Health facilities, Loan programs-health, Loan programs-housing and community development, Mortgage insurance, Nursing homes, Reporting and recordkeeping requirements.

Accordingly, parts 5 and 232 of title 24 of the Code of Federal Regulations are amended as follows:

PART 5 -- GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

1. The authority citation for 24 CFR part 5 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, 3535(d), and Sec. 327, Pub. L. 109-115, 119 Stat. 2936.

2. In § 5.801, revise paragraph (c)(4) introductory text to read as follows:

§ 5.801 Uniform financial reporting standards.

* * * *

(c) * * *

(4) For entities listed in paragraph (a)(6) of this section, the financial information to be submitted to HUD in accordance with paragraph (b) of this section must be submitted to HUD on a quarterly and fiscal-year-to-date basis, within 60 calendar days of the end of each quarterly reporting period deadline, except that the final fiscal-year-end quarter and fiscal-year-to-date reports must be submitted to HUD within 90 calendar days of the end of the fiscal-year-end quarter, or within such additional time as may be provided by the Commissioner for good cause shown. HUD may direct that such forms be submitted to the lender or another third party in addition to or in lieu of submission to HUD.

* * * *

PART 232 – MORTGAGE INSURANCE FOR NURSING HOMES, INTERMEDIATE CARE FACILITIES, BOARD AND CARE HOMES, AND ASSISTED LIVING FACILITIES

3. The authority citation for 24 CFR part 232 continues to read as follows:

Authority: 12 U.S.C. 1715b, 1715w; 42 U.S.C. 3535(d).

4. Revise § 232.1009 to read as follows:

§ 232.1009 Financial reports.

(a) The borrower must provide HUD and lender an audited annual financial report based on an examination of its books and records, in such form and substance required by HUD in accordance with 24 CFR 5.801 and 24 CFR 200.36.

(b) Operators must submit financial statements quarterly within 60 calendar days of the date of the end of each fiscal quarter, setting forth both quarterly and fiscal year-to-date information, except that the final fiscal year end quarter must be submitted to HUD within 90 calendar days of the end of the quarter, in accordance with 24 CFR 5.801(c)(4), or within such additional time as may be provided by the Commissioner for good cause shown. HUD may direct that such forms be submitted to the lender or another third party in addition to or in lieu of submission to HUD.

Date: September 10, 2014

Carol J. Galante
Assistant Secretary for Housing –
Federal Housing Commissioner

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[FR Doc. 2014-22069 Filed 09/15/2014 at 8:45 am; Publication Date: 09/16/2014]